



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

March 9, 1995

Honorable Keith Oakley  
Chair  
House Committee on Public Safety  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 95-006

Re: Whether a public school district must obtain a payment bond on a public work contract for more than \$25,000 that its insurer makes, under authority of the insurance contract between it and the insurer, with the prime contractor on a public work consisting of repairs to be performed on damaged school district property (ID# 31742)

Dear Representative Oakley:

You ask whether a public school district must obtain a payment bond on a public work contract for more than \$25,000 that its insurer makes, under authority of the insurance contract between it and the insurer, with the prime contractor on a public work consisting of repairs to be performed on damaged school district property. We quote the following facts from your request letter:

A public school district suffered damages to one of its public schools. There existed an insurance contract between the public school district and the insurer which covered the loss. The insurer assumed control over the public work to be performed on the basis of the terms of its insurance contract with the public school district. The public work to be performed on the public school was in excess of \$25,000.00. The public school district did not obtain a payment bond from the insurer or any other entity which could be considered the "prime contractor."

No mechanic's lien may attach to public property unless the right is expressly conferred by statute. *E.g., Atascosa County v. Angus*, 18 S.W. 563 (1892). "As a matter of public policy, mechanic's liens are not permitted on public improvements where payment and performance bonds are required." *City of La Porte v. Taylor*, 836 S.W.2d 829, 831 (Tex. App.--Houston [1st Dist.] 1992, no writ); see *Quincy Lee Co. v. Lodal & Bain Eng'rs, Inc.*, 602 S.W.2d 262, 263 (Tex. 1980). Section 2253.021 of the Government Code requires a performance bond and a payment bond on a public work project:

(a) A governmental entity that makes a public work contract for more than \$25,000<sup>1</sup> with a prime contractor shall require the contractor, before beginning the work, to execute to the governmental entity a performance bond and a payment bond.

(b) The performance bond is:

(1) solely for the protection of the state or governmental entity awarding the public work contract;

(2) in the amount of the contract; and

(3) conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents.

(c) The payment bond is:

(1) solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material; and

(2) in the amount of the contract.

Gov't Code § 2253.021(a) - (c) (footnote added).

The purpose of the requirement of a payment bond on a public work project is to protect subcontractors who supply labor and materials to the public work. JOE F. CANTERBURY, JR., TEXAS CONSTRUCTION LAW MANUAL § 3.15, at 123 (1992). Section 2253.027 of the Government Code sets forth the consequences the governmental entity may suffer if it fails to obtain a payment bond as required by section 2253.021:

If a governmental entity fails to obtain from a prime contractor a payment bond as required by Section 2253.021:

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<sup>1</sup>During the same legislative session that recodified former V.T.C.S. article 5160, sections A and C, as section 2253.021 of the Government Code, the legislature also amended section A of former article 5160 without reference to the repeal of the article by section 46 of chapter 268 of the Acts of the Seventy-third Legislature, Regular Session. As so amended, section A provides that the maximum size of a prime contract on which a performance bond is not required is \$100,000 (it was formerly \$25,000). The amendment of section A is preserved as part of section 2253.021, the code provision that revised section A. See Gov't Code § 311.031(c).

(1) the entity is subject to the same liability that a surety would have if the surety had issued a payment bond and if the entity had obtained the bond; and

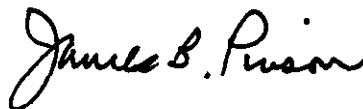
(2) a payment bond beneficiary is entitled to a lien on money due to the prime contractor in the same manner and to the same extent as if the public work contract were subject to Subchapter J, Chapter 53, Property Code. [Footnote omitted.]

We understand the issue you raise to be whether section 2253.021 applies to a public work contract made by the insurer of a governmental entity rather than by the governmental entity in its own name. The situation you describe, however, shows that the insurance company has contractual authority to act as the agent of the school district in making the repairs. "It is a general rule that the act of an agent is the act of his principal, which is expressed in the maxim: 'Qui facit per alium, facit per se.'" *Baldwin v. Polti*, 101 S.W. 543, 544 (Tex. Civ. App. 1907, writ ref'd). Therefore, we believe that the contract of the insurer in the facts you provide is, in the eyes of the law, the contract of the public school district and that section 2253.021 applies expressly. We accordingly conclude that a public school district must obtain a payment bond on a public work contract for more than \$25,000 that its insurer makes, under authority of the insurance contract between it and the insurer, with the prime contractor on a public work consisting of repairs to be performed on damaged school district property.

### S U M M A R Y

A public school district must obtain a payment bond on a public work contract for more than \$25,000 that its insurer makes, under authority of the insurance contract between it and the insurer, with the prime contractor on a public work consisting of repairs to be performed on damaged school district property.

Yours very truly,



James B. Pinson  
Assistant Attorney General  
Opinion Committee